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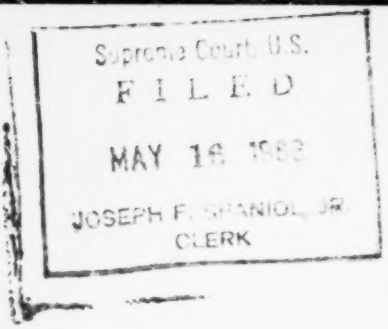

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BLANCHE A. DAVID, Petitioner,

v.

DEFENSE LOGISTICS AGENCY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Whether the statutory right to an attorney under the Civil Service Reform Act (5 U.S.C. 7701(a)(2)) at a Merit Systems Protection Board hearing may be denied to a discharged federal employee on the basis that petitioner did not notify the hearing officer of her inability to locate an attorney prior to the MSPB hearing and that the petitioner was not diligent in locating the services of an attorney?

2. Whether the constitutional right to due process of law was violated by Defense Logistics Agency in terminating petitioner contrary to agency regulations and by the Merit Systems Protection Board in failing to grant a continuance to petitioner to allow a representative and in failing to follow regulations to gauge the validity of the punishment?

3. Whether the Court of Appeal was remiss in its statutory obligation under 5

U.S.C. 7703 in failing to review the record to determine whether the agency action was supported by substantial evidence?

PARTIES TO THIS PROCEEDING

The Petitioner is BLANCHE A. DAVID (hereafter DAVID).

The Respondent is DEFENSE LOGISTICS AGENCY (hereafter DLA).

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DEFENSE LOGISTICS AGENCY, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FEDERAI CIRCUIT

John Murcko, Esq. on behalf of BLANCHE A. DAVID petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeal for the Federal Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeal for the Federal Circuit was reported in an unpublished decision on September 18, 1985.

(Appendix 1a-2a)[1]. The Court of Appeal issued a further order on February 27, 1986 denying a petition for rehearing and request for rehearing en banc. (App. 3a). The decision of the Merit Systems Protection Board is unreported. (App. 4a-22a). The decision of the Defense Logistics Agency notifying petitioner of her termination was dated May 3, 1984. (AF, Ex. B).[2]

JURISDICTION

The final order and judgment of the Court of Appeal was entered on February 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES

The authority relied upon in this petition include the Fifth Amendment; 5

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1. Hereafter "Appendix" will be "App".
2. AF refers to the agency file of the Defense Logistics Agency which is part of the record of the MSBP. It has Exhibits A-W.

U.S.C. 7701; 5 U.S.C. 7703; 5 C.F.R. 1201. 31. 5 C.F.R. 630.40; and FPM Section 751.

STATEMENT

Petitioner DAVID had been a dedicated employee of the federal government for over 41 years commencing April 17, 1942; and ending on May 18, 1984.

Petitioner commenced working for the United States in 1942 as a clerk. (AF, Ex. A). On January 1, 1947 petitioner acquired permanent status in the competitive classified civil service. At the time she worked as a clerk stenographer. (AF, Ex. W). Petitioner worked for the following federal agencies over the last forty-one years: Department of the Navy (1942-1943); Department of Commerce (1943); Department of the Treasury (1943-1968); Defense Logistics Agency (Defense Contract Management Area Service - SF) (1968-1984).

Her last superior, Elaine Courtier,

reported that petitioner was a good employee and had an excellent leave record prior to May, 1983. (RT 34).[3]

In 1981 petitioner became a substitute stewardess for American Federation of Government Employees Local 2723. In March 1982 petitioner became a regular stewardess. In her position as stewardess, petitioner represented employees at grievance hearings with respondent DLA.

Between July 1977 to the present respondent occupied the office building at 1250 Bayhill Drive, San Bruno, California. On numerous occasions between 1977 and 1983 there were problems regarding the dangerous and unsafe quality of air at the workplace as a result of the air conditioning system and the lack of proper ventilation. (App. 23a-29a).

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3. Reporter's Transcript hereafter RT. A copy of the transcript will be lodged with the Court.

Petitioner filed complaints regarding the unsafe and polluted air with the Federal Labor Relations Board and with the Department of Defense in 1982-1983. (App. 31a). She also filed complaints against respondent regarding employee discrimination. (App. 36a-39a).

On January 14, 1983 petitioner testified through her affidavit in a hearing at the United States Court of Appeal for the Ninth Circuit, San Francisco, California in the case of Parodi v. MSPB, 690 F.2d 731 (9th Cir. 1982). She testified on behalf of Irene Parodi and against respondent regarding the position offered to Ms. Parodi and the unsafe quality of air in the work spaces. (App. 36a-39a).

On numerous occasions between February 1, 1983 and May 13, 1983 petitioner was harassed by various officials of the respondent.

On May 16, 1983 petitioner was not

able to work due to a serious illness later diagnosed as pneumonia. Petitioner called her supervisor on May 16, 1983 and notified her of the illness and requested annual leave. Five days later on May 23, 1983 petitioner called Mrs. Roberts and requested the annual leave be changed to sick leave. The requests were granted and petitioner was placed on sick leave. (RT 16).

Petitioner called her supervisor from her home on sixteen occasions between May 17 to June 3, 1983 regarding her illness.

On June 3, 1983 petitioner was hospitalized with extensive, severe pneumonia. (App. 40a-41a). On that date, petitioner filled out a SF-71 and gave it to hospital officials to mail. (RT 15).

In July, 1983 a friend of petitioner called Captain Iverson, the head of respondent agency, and notified his secretary that petitioner was in Mount Zion Hospital

in San Francisco with double pneumonia. (RT 44-45).

On July 19, 1983 Mrs. Robert wrote to petitioner and requested that she fill out standard form 71, hereafter SF-71. (RT 21).

In July 1983 petitioner was again hospitalized. This time it was for eye surgery. The nurse from Dr. Knapp's office notified Elaine Courtier of the surgery. (RT 52-53). On August 8, 1983 petitioner mailed in a second SF-71 to respondent. (RT 15).

On September 8, 1983 petitioner mailed a third SF-71 requesting sick leave from May 16, 1983. (AF, Ex. T). It was received by Elaine Courtier and approved. (RT 25).

On September 9, 1983 Dr. David Mackler sent a letter to the respondent notifying it of petitioner's severe pneumonia, of the cataracts in both eyes, of the surgical operation in July 1983, and of the severe osteoporosis. He projected a return to

work date for petitioner of January 1984. (App. 40a-41a).

On October 27, 1983 Elaine Courtier wrote to petitioner requesting a doctor's statement. (AF, Ex. Q). On November 8, 1983 petitioner wrote to respondent requesting claim injury forms. (AF, Ex. P).

On November 16, 1983 Courtier again wrote and sent the requested forms. She requested a doctor's certificate of sick leave, and petitioner's anticipated return date to work. (AF, Ex. M).

On November 21, 1983 petitioner informed respondent that a physician's certificate and SF-71 had been mailed to them. She also requested that her leave record be changed from sick leave to leave without pay. (AF, Ex. M).

On November 25, 1983 respondent denied petitioner's request to be placed on leave without pay. (AF, Ex. K).

On November 29, 1983 petitioner's supervisor, Elaine Courtier, received a call from a friend of petitioner informing her that petitioner was to be operated on for eye surgery on November 30, 1983. Courtier also received a call on November 29, 1983 from Dr. Knapp's nurse, Mrs. Briscoe, who informed her that petitioner was going to the hospital for eye surgery on November 30, 1983. (RT 33-34).

On the same day, Captain R.I. Iverson called Dr. Knapp's office and spoke to Mrs. Briscoe. He learned that petitioner was a patient and was scheduled for eye surgery on November 30, 1983. There had been a previous eye operation on petitioner in July 1983, and the present operation was on the second eye. She had recovered from the first and was not ready for the second operation. (RT 57-59).

Nurse Briscoe had notified Captain Iverson that the date for petitioner's

return to work would be at least four months after the operation or April 1, 1984. (App. 22a).

On December 1, 1983 petitioner was placed on absence without leave status (AWOL). (RT 34).

On March 7, 1984 Courtier wrote to petitioner notifying her that petitioner will be removed from federal service after 30 days for absence without leave since December 1, 1983 and for failure to request leave in accordance with established procedures. (AF, Ex. D).

Petitioner was still recuperating from her eye surgery at the time. (App. 43a).

On May 18, 1984 petitioner was terminated from employment with the federal government after 41 years of outstanding service. (AF, Ex. A, B).

Petitioner appealed her decision to the Board on June 6, 1984. The original

hearing had been scheduled for August 16, 1984. It was continued pursuant to request of respondent until August 23, 1984. On August 22, 1984 petitioner requested a continuance of the hearing to obtain counsel. She had not been able to obtain the services of an attorney with requisite skill and experience before the Board until the day before the hearing. (App. 45a-47a).

At the MSPB hearing on August 23, 1984 respondent was represented by an attorney, Ms. Jennifer Smith. However, petitioner did not have an attorney to represent her at the hearing. At the very commencement of the hearing she requested a continuance to obtain counsel. She objected to the hearing without having a representative present. Petitioner stated that she could not properly represent herself because she was not experienced in hearings before the MSPB, because she was ill and weak, and because she was not sufficiently familiar

with the art of cross-examination, or the type of evidence that needed to be produced. Petitioner repeatedly requested that the hearing not proceed because she was without an attorney. She did not produce any evidence on her own behalf. (RT 4-9, 14, 37, 38, 44, 51, 56, 66).

The hearing officer denied petitioner the right to an attorney, and denied her a continuance to obtain an attorney on the basis that she was not diligent in securing counsel. (App. 10a-11a).

The MSPB denied the petitioner's appeal for reinstatement. It held that the agency proved by a preponderance of evidence that the petitioner was absent without leave from December 1, 1983 to March 7, 1984 and that she failed to follow the regulations in requesting leave; that the absence impaired the efficiency of the service, and that the penalty of termination was reasonable for the conduct

involved. (App. 4a-22a).

Petitioner filed an Appeal to the United States Court of Appeal for the Federal Circuit on October 20, 1984. The decision was rendered on September 18, 1985 affirming the decision of the MSPB sustaining petitioner's removal for being absent without leave and for failure to request leave in accordance with established procedures. The Court of Appeal affirmed on the basis of the opinion of the MSPB. It did not write a separate opinion.

On October 15, 1985 petitioner filed a petition for rehearing and for a hearing en banc. The petition for rehearing and for rehearing en banc were denied on February 27, 1986. (App. 3a).

REASONS FOR GRANTING THE PETITION

The Court of Appeal by affirming the opinion of the MSPB has held that a

petitioner's statutory right to an attorney at a MSPB hearing under 5 U.S.C. 7701 can be denied by a hearing officer on any basis. This unwarranted action presents a misconstruction of the rights guaranteed to a federal employee by the Civil Service Reform Act of 1978; P.L. 95-454, 92 Stat. 1111.

The holding below is inconsistent with this Court's decisions that agency action must be carried out in deference to the statutory framework. The holding below is further inconsistent with this Court's decisions recognizing that agency action taken in violation of its own regulation amounts to a denial of due process and is therefore unlawful. There were three regulations that were violated by the MSPB and the DLA. The first was by the agency in changing petitioner's status from sick leave to absence without leave. The second and third were by the

MSPB in refusing to give petitioner a continuance to obtain counsel and in failing to consider the twelve criteria for measuring the propriety of the penalty.

The Court of Appeal also failed to properly review the record to determine if the evidence was substantial as required under 5 U.S.C. 7703. The Court of Appeal has incorrectly decided an issue of significant importance to the members of the executive agency. This decision is in contradiction to express agency regulations and statutes. Review by this Court is required.

1. This Court should grant certiorari to the Court of Appeal because the decision clearly conflicts with prior Supreme Court decisions. F.C.C. v. Broadcasting Service Organization, 337 U.S. 901 (1949); S.E.C. v. Otis and Company, 338 U.S. 843 (1949); Supreme Court Rules, Rule 171(c).

The federal courts have power to grant relief to the action of a federal executive official where the department has exceeded its statutory authority. American School of Magnetic Hearing v. McAnnulty, 187 U.S. 94. The interpretation by executive officials of Acts of Congress do not bind the federal courts from reviewing that interpretation or action taken pursuant to that interpretation.

This Court initially reviewed agency administrative action taken pursuant to an act of Congress only to determine whether the agency "was acting within the scope of its lawful powers." Reaves v. Ainsworth, 219 U.S. 296, 304 (1911). Federal courts originally did not review the factual basis for the agency action. United States ex rel. French v. Week, 259 U.S. 336 (1922).

From the earliest this Court ruled that action of the agency in discharging

personnel in contravention of a statute could be reviewed because "the case involves the construction of the general statutes of the United States." Denby v. Berry, 263 U.S. 29, 31 (1923); Patterson v. Lamb, 329 U.S. 539, 542 (1947); Billings v. Truesdale, 321 U.S. 542 (1944).

In Harmon v. Brucker, 355 U.S. 579, this Court held that federal courts may review agency action to determine if an official has acted outside the scope of his powers. This Court stated:

> "Generally, judicial relief is available to one who has been injured by an Act of a governmental official which is in excess of his express or implied powers...The District Court had only had jurisdiction...but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this action would be available." Harmon v. Brucker, 355 U.S. at 581-582.

This Court in the variable reinlistment bonus cases, United States v. Larinoff, 431 U.S. 864, held that Naval action changing a reinlistment bonus was in conflict with a Congressional statute and invalid.

The Court of Appeal below incorrectly upheld the decision of the MSPB by affirming its decision allowing petitioner's termination from federal employment. The MSPB decision itself was based on a procedural violation of the Civil Service Reform Act, P.L. 95-454, 92 Stat. 1111.

Under 5 U.S.C. 7701(a), an employee has certain rights at an appeal hearing before the MSPB. This includes the right:

> "(1) to a hearing for which a transcript will be kept;
>
> (2) to be represented by an attorney or other representative."

In addition, the Court of Appeal must review the MSPB decision to determine whether the MSPB decision was arbitrary,

capricious, or an abuse of discretion; was obtained without following applicable procedures, or was unsupported by substantial evidence in the record. 5 U.S.C. 7703(c); Lindahl v. OPM, ___ U.S. ___, 105 S.Ct. 1620, 1624 (1985).

a. Plain language of the statutes.

The Civil Service Reform Act of 1978 (CSRA) comprehensively overhauled the civil service system. Congress created a new framework for judging adverse actions taken against federal employees. It also established exacting standards for review of agency decisions. "In the MSPB review procedure, the appellant is entitled to an evidentiary hearing, to a transcript, and to the presence of an attorney or other representative." Lindahl v. OPM, ___ U.S. ___, 105 S.Ct. 1620, 1624, n. 5.

In determining the meaning of any new statute, this Court traditionally begins "with the familiar canon of statutory construction that the starting point for

interpreting a statute is the language of the statute itself." Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 702 (1980).

Looking at the statute, itself, Congress specifically stated that an employee who has been the subject of an adverse action has the right to be represented by an attorney at the MSPB hearing. This Court has recognized that right in Lindahl. Under the plain language of 5 U.S.C. 7701, petitioner DAVID had the right to be represented by an attorney.

The MSPB official denied the right to representation to DAVID. The official claimed two reasons for the denial: first, it held that petitioner did not notify the official in advance that she did not have an attorney. Second, it held that she was not diligent in securing counsel. (App. 7a, 10a-11a).

The effect of this construction of 5 U.S.C. 7701(a) resulted in a denial of representation to DAVID at the hearing in violation of the plain language of the statute. The statute does not require that an employee appearing before the MSPB must notify the hearing official before the hearing that she did not have an attorney. Nor does the statute require that the employee show due diligence in obtaining an attorney, or be denied the right to representation.

This interpretation of the statute does violence to the intent of Congress in passing the CSRA. Its intent was to provide a new framework to guarantee the rights of federal employees at MSPB hearings. A crucial part of this procedure was to guarantee the employee the right to be represented at a hearing.

The MSPB action in denying petitioner her right to an attorney at the hearing

was action taken in violation of 7701(a)(2). The MSPB hearing officer acted in excess of his power. The action was in conflict with a Congressional statute and invalid.

Even more importantly, the factual basis upon which the hearing official relies was incorrect. The petitioner did notify the hearing officer the day prior to the hearing on August 22, 1984 that she was not able to proceed at the hearing because the attorney she was able to locate the day before the hearing did not have the opportunity to prepare for her case and to properly present her case until October, 1984. (App. 10a, 45a). Second, the MSPB claimed that she did not use due diligence to obtain an attorney. She obtained an attorney within six weeks of the time that she filed her notice of

appeal.[4] It is difficult to locate attorneys who handle federal employee cases.

The action of the MSPB was in violation of the procedures of law since petitioner was entitled to an attorney and the MSPB denied that right to her. The Court of Appeal action in affirming the MSPB decision was therefore also in violation of the CSRA.

b. Legislative history of the statute.

In determining the meaning of a statute and the legislative intent, the court has a duty to examine the legislative intent. United States v. Security Bank, ___ U.S. ___, 103 S.Ct. 407, 414, n. 12

4. Petitioner filed her notice on appeal on June 6, 1984. The hearing was originally scheduled on August 16, 1984. It was continued for one week, until August 23, upon request of the agency DLA. The MSPB incorrectly states the hearing was held on July 19, 1984.

(1982). This Court must ascertain the clearly expressed legislative intent of a statute. United States v. American Trading Association, 310 U.S. 534, 543-4 (1940).

The Congress in passing the CSRA recognized that the "central congressional purpose" was to "protect the right of employees, recognized by the Supreme Court in Arnett v. Kennedy, 416 U.S. 134 (1974) to a full and fair consideration of their case." United States Congressional and Administrative News, 95th Congress, Second Session (1978), 2773.

On hearings before the MSPB, the history explicitly states that

> "Section 7701 provides for the processing of adverse actions and other appeals within the jurisdiction of the Merit Systems Protection Board. The Board may refer any case appealable to it for adjudication to an appeals officer or to an administrative law judge who would have the authority to decide the case.

> Sections 7701(b) and (c) govern the type of hearing an employee must receive before the Board. The Committee amended this provision of the bill to make it absolutely clear that an employee would receive a full evidentiary hearing in any case where there is a dispute as to any genuine and material issue of fact - that is, a dispute as to facts which must be resolved before a decision can be reached, and which may be most appropriately considered and resolved through the traditional adjudicatory methods used in evidentiary hearings. This would include instances, for example, where oral testimony and cross-examination is the best way to test the credibility of the witnesses. The bill was amended by the Committee to specifically provide that in such cases an evidentiary hearing should include the traditional right of cross-examination. In any case involving removal of an employee from the Federal service, the Board, because of the importance of the case, must provide that the case be heard by an administrative law judge selected according to the especially demanding procedures specified in the Administrative Procedure Act, or the Board must assign the case to one of its more qualified and experienced appeals officers."

Id. at 2775, 2776.

In addition, the right to an attorney at the appellate stage of an adverse action was statutorily extended to the predecision stage of the agency action. Id. at 2772-2773, 5 U.S.C. 7513(b).

Thus, the legislative history is clear that Congress intended to provide a full and fair hearing wherein the adversely affected employee will be given a full and fair consideration of her (his) case.

In this case, the hearing officer prevented DAVID from receiving a full and fair consideration of the case. First, without the assistance of counsel, DAVID was not able to muster the necessary evidence to show the true status of her medical condition, the facts which would prove that the medical reports were sent by the medical doctors to the agency DLA, and that the actions taken by DAVID were in compliance with the regulations.[5]

5. See Appellant's Opening Brief in

Also, DAVID did not have the knowledge or expertise to properly cross-examine the witnesses for the agency who attempted to show that DAVID was remiss in not properly notifying the agency of her illness and other inability to work. Proper cross-examination of these witness would have shown that they were fabricating this testimony since the documents had been mailed by DAVID and her doctor to agency officials on three occasions. Also, proper cross-examination would have revealed that the true reason for the termination was DAVID's actions as a union stewardess in vigorously advocating employee rights at grievance meetings before the direction of DLA.[6]

Court of Appeal, p. 21

6. (See App. 16a). Also, other union officials could have been called, including the President of AFGE, Local 2723 who could have testified that the actions of DLA were in retaliation for petitioner's union activity.

Thus, contrary to Congressional intent, a full and fair hearing was never held. Contrary to Congressional intent, the adjucatory method required in evidentiary hearings, including the right to an attorney, was never held. Contrary to Congressional intent, the traditional right of cross-examination was not allowed. The hearing by the MSPB official was a sham. It was clearly not in accordance with procedures intended by Congress to govern the hearings. The Court of Appeal below was remiss in its duties in failing to recognize that the MSPB denied these essential procedures to petitioner. More importantly, the actions of the official were in excess of his powers and contradictory to the decisions of this Court in United States v. Larinoff, 431 U.S. 864 and Harmon v. Brucker, 355 U.S. 579. This Court should grant this petition and reverse the decision of the

Court of Appeal.

2. The decision of the Court of Appeal also conflicts with decisions of this Court on violations of an agency of its own regulations.

Administrative action of the executive department in violation of their own regulations establishing procedures for review are invalid. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Service v. Dulles, 354 U.S. 363, 388 (1957). The head of an executive department must comply with its own procedural regulations in dismissing an employee. Vitarelli v. Seaton, 359 U.S. 535 (1959).

"Where the military has laid down its own rules and regulations, such rules and regulations cannot be ignored, and courts may examine the order to ascertain whether the military's rules and regulations were

violated in a manner resulting in substantial prejudice." Hall v. Fry, 509 F.2d 1105, 1110; United States ex rel. Sledgeski v. Commanding Officer, 478 F.2d 1147 (2nd Cir. 1973); Kohn v. Laird, 460 F.2d 1318 (7th Cir. 1972). Action by military service taken in violation of its regulations is invalid and void. Geiger v. Brown, 419 F.2d 714 (D.C. Cir. 1969); Grimm v. Brown, 449 F.2d 654 (9th Cir. 1971); Antonik v. United States, 445 F.2d 592 (6th Cir. 1971); Conn v. United States, 376 F.2d 878 (Cl.Ct. 1967).

Where an agency has taken adverse personnel action in substantial violation of procedural regulation, it is a void action and the employee is entitled to recover any pay of which he has been illegaly deprived. Service v. Dulles, 354 U.S. 363; Leone v. United States, 204 Ct.Cl. 334 (1974); Hanifan v. United States, 354 F.2d 358 (Ct.Cl. 1965).

a. In the present case, the respondent's action is guided by federal regulation promulgated by the Office of Personnel Management. 5 C.F.R. 630.401 provides that "An agency shall grant sick leave to an employee when the employee...(b) Is incapacitated for the performance of duties by sickness, injury, or pregnancy and confinement."

In Nash v. United States Postal Service, 8 MSPB 8 (1981) the Board held that an employee who was placed on AWOL status and terminated even though he submitted medical evidence untimely in accordance with the agency's sick leave procedures was improper. The Board ruled that the agency action in declaring an employee AWOL when they have valid medical information that he is ill or incapacitated is a violation of the agency regulations and invalid.

The identical situation exists in the

present case. Petitioner was placed on sick leave status on May 16, 1983.

On December 1, 1983 the respondent had information that petitioner was incapacitated for the performance of her duties due to eye surgery. This had been substantiated by a call first from a friend of the petitioner, then by Mrs. Briscoe, the nurse for Dr. Knapp. It was further substantiated when Captain R.I. Iverson personally telephoned Dr. Knapp's office on November 29, 1983 and was told that petitioner was scheduled for eye surgery on November 30, 1983 by Dr. Knapp. (RT 35-37). Dr. Knapp's nurse had informed Captain Iverson that petitioner's return to work date would be April 1, 1984. (App. 43a).

The action by respondent on December 1, 1983 was in violation of its own regulations since they had information that petitioner was incapacitated due to eye

surgery and the agency was required to grant sick leave under 5 C.F.R. 630.401.

The action in violation of the regulation was harmful to petitioner since it resulted in her being unlawfully placed in an AWOL status on that day. The change of status eventually resulted in her termination.

Had the agency followed its own regulations regarding sick leave, this dismissal would not have occurred. Thus, the MSPB action is valid, and the Court of Appeal decision affirming the MSPB action is also invalid.

b. In regulations promulgated by the MSPB, "All parties to an appeal may be represented in any manner relating to an appeal." 5 C.F.R. 1201.31. Also, under 5 C.F.R. 1201.31 where a counsel is dis-

qualified petitioner must be granted a continuance.

The MSPB violated its own regulations by denying DAVID the right to be represented in any manner relating to the appeal under 5 C.F.R. 1201.31. The MSPB hearing officer also violated its own regulation in failing to grant a continuance to her to have an attorney present. (App. 10a, 45a). The MSPB in effect disqualified DAVID's selected representative by refusing to give a continuance on either August 22 or 23, 1984. DAVID had sought to retain counsel on August 22nd. However, the hearing officer refused to grant a continuance to counsel to prepare for the case. It would not have been possible for counsel to prepare for the hearing, to prepare for cross-examination of government witnesses, to subpoena the doctors, nurses, union officials, and other employee witnesses in less than 24

hours. The action of the hearing officer was harmful error because it prevented DAVID from having a full and adequate hearing on the issue of the validity of her termination.

c. Last, the MSPB violated the regulations contained in the Federal Personnel Manual, Ch. 751, sub. 1-20 (1976). FPM 751 specifically provides for twelve criteria that are relevant in assessing the reasonableness of a penalty of dismissal by an agency. Neither the agency nor the MSPB considered all twelve criteria in imposing the penalty. The MSPB only considered five of those criteria including the seriousness of the offense, the supervisor's confidence in petitioner's ability to perform work, the clarity of petitioner's knowledge of the rules violated, her past work and conduct record, and her potential for rehabilitation.

(App. 14a-16a). It failed to consider the status of her position, her lack of contact with the public, that her absence was not a serious burden, the lack of notoriety of the offense (being absent because of eye surgery or bronchitis did not have any adverse impact on the agency), that petitioner was greviously incapacited from May 16, 1983 to April 1, 1984 (she had two eye surgeries and needed four months of recovery for each surgery, and had severe bronchitis).

DAVID was a forty-two year employee with an unblemished record. She was ill in 1983-1984 and undergoing medical treatment for cataracts and bronchitis. The actions of termination were clearly in excess of the nature of any offense, for a minor AWOL, which was nonexistent.

More important, the DLA and MSPB violated the regulatory guidelines by refusing to consider these factors in assessing

the penalty.

The decision of the Court of Appeal below in affirming these regulatory violations of the DLA and the MSPB was in contradiction of the numerous decisions of this Court. In Service v. Dulles, 354 U.S. 363, 388, this Court held that action taken by an agency in violation of its procedural regulations is an invalid action. Also, Vitarelli v. Seaton, 359 U.S. 535 prohibits an agency from ignoring its regulations in dealing with employees.

The actions are also in violation of 5 U.S.C. 7703(c) which require the Court of Appeal to disallow agency action taken in violation of procedural requirements.

3. The Court of Appeal failed to properly review the record of the MSPB, pursuant to 5 U.S.C. 7703(c).

Under the Civil Service Reform Act, the Court of Appeal shall review the record

of the MSPB and hold unlawful and set aside agency action, findings or conclusions found to be unsupported by substantial evidence.

First, the decision of the MSPB must be supported by substantial evidence or the Court of Appeal shall set aside the findings. Lindahl v. OPM, ___ U.S. ___, 105 S.Ct. 1620, 1624, n. 5 (1985); Walker v. Washington, 627 F.2d 541, 549 (1980).

In this case, it appears that the Court of Appeal never fully reviewed the record. Its decision only adopts the decision of the MSPB. (App. 1a-2a). It never responded to the issues raised by petitioner concerning the lack of substantial evidence in that (1) the agency failed to prove that petitioner was AWOL; (2) that the adverse action against petitioner was precluded by the laws granting sick leave; and (3) that the agency failed to prove that petitioner failed to

follow agency procedures in obtaining sick leave.[7]

Had the Court of Appeal properly reviewed the record, it would have discovered that the findings of the MSPB were not supported by substantial evidence.

a. The agency failed to prove that petitioner was AWOL.

The burden is on the agency to support its decision. The burden extends to "every element of the proof of the agency's case," including the propriety of the decision to deny leave. In re Van Sciver, 1 MSPB 94 (1979).

In Bavier v. Department of Transportation, 5 MSPB 73, 74 (1981) the petitioner requested hardship transfers based on his medical illness. They were denied. He was first declared to be temporarily medi-

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7. See Petitioner's Brief in Court of Appeal, pp. 11-16.

cally disqualified. Later he was found to be medically fit and returned to duty. He did not report to duty and was placed in an AWOL status, and later terminated. The court held that the agency failed to prove that appellant was in fact absent without leave, and the decision was declared void.

The facts in the present case are identical to those in the Bavier case. The petitioner was granted sick leave on or about May 16, 1983 due to chronic bronchitis, pneumonia and cataracts. This was changed to sick leave on May 23, 1983. (RT 20). Later by request of petitioner on September 8, 1983 her sick leave was approved and made retroactive to May 16, 1983. The respondents had received a valid SF-71 on or about September 8, 1983. (RT 25). A letter from Dr. Mackler was also sent to the respondent stating that petitioner would not be permitted to

return to work until January 1984. (App. 40a-41a).

Respondent also admitted that they had word from Dr. Knapp's office that petitioner was to be operated on for eye surgery on November 30, 1983. (RT 30-31). In the record is an exhibit from Dr. Knapp stating that petitioner's return to work date was April 1, 1984. (App. 43a).

Thus, the decision of the respondent to place petitioner in an AWOL status on December 1, 1983 was not supported by a preponderance of the evidence. The respondent never introduced any medical evidence that petitioner was medically fit to return to duty. "The determination regarding his medical disqualification was a factual decision of crucial importance to him and to which he is entitled." Bavier v. Department of Transportation, 5 MSPB 73, 74.

Thus, there was no evidence to warrant changing petitioner's status from sick

leave to AWOL on December 1, 1983 and use it as a basis for termination on May 18, 1984. As such, the respondent's decision to remove the petitioner was not supported by a preponderance of evidence. The Court of Appeal decision should be reviewed to ascertain the extent of this error.

b. The agency also failed to prove that petitioner failed to follow procedures in obtaining sick leave.

Under applicable regulations, an agency may grant sick leave only where there is evidence to support the condition. "Regardless of the duration of the absence, an agency may consider an employee's certification as to the reason for his absence as evidence administratively acceptable." 5 C.F.R. 630.403. When the absence is over three days, the agency may also require a medical certificate or

"other administratively acceptable evidence as to the reason for the absence." 5 C.F.R. 630.403.

The second reason given by the agency for the termination was that petitioner failed to request leave in accordance with established procedures. (AF, Ex. C). The respondent testified that it repeatedly requested an SF-71 from petitioner and that she provide a medical certificate concerning the nature of her illness and expected return to duty date. (RT 34).

Respondent admitted that they received a completed SF-71 form from petitioner in September 1983. (RT 25). At the same time, on September 9, 1983, petitioner's doctor had mailed to respondent a letter explaining the medical condition of bronchitis, pneumonia and cataracts. (App. 40a).

Respondent also admitted that it received direct evidence on November 29,

1983 that petitioner was in the hospital for eye surgery. There was direct contact between Dr. Knapp's office and the highest supervisory officials, Iveron, Parker and Courtier, attesting to petitioner's eye surgery and an expectant four month recovery period. (RT 30-31).

Also, petitioner introduced evidence that she completed and had mailed three SF-71 forms for sick leave on June 3, 1983, on August 8, 1983 and on September 8, 1983. (RT 15, 44, 45).

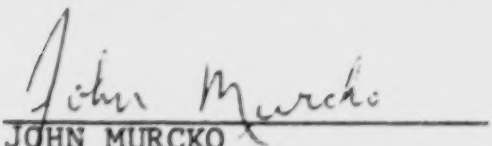
Thus, there was full or substantial compliance with the regulations requesting sick leave. The agency failed in its burden to show there was a violation. The Court of Appeal was remiss here again in failing to properly review the record. The decision should be set aside.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: May 9, 1986

Respectfully submitted,



JOHN MURCKO
Attorney for Petitioner
BLANCHE A. DAVID

85 - 1899

Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE ~~UNITED~~ STATES

OCTOBER TERM, 1985

BLANCHE A. DAVID, Petitioner,

v.

DEFENSE LOGISTICS AGENCY, Respondent.

APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT

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UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

Appeal No. 85-1904

BLANCHE A. DAVID, Petitioner,

v.

DEFENSE LOGISTICS AGENCY, Respondent.

DECIDED: September 18, 1985

Before MARKEY, Chief Judge, COWEN, Senior Circuit Judge, and BALDWIN, Circuit Judge.

BALDWIN, Circuit Judge.

DECISION

The decision of the Merit Systems Protection Board sustaining petitioner's removal for absence without leave and failure to request leave in accordance with established procedures is affirmed.

OPINION

Petitioner's arguments are adequately treated in the board opinion dated Septem-

ber 24, 1984. We affirm on the basis of that opinion.

UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

Appeal No. 85-1904

BLANCHE A. DAVID, Petitioner,

v.

DEFENSE LOGISTICS AGENCY, Respondent.

ORDER

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case.

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

Francis X. Gindhart,
Clerk

Dated: February 27, 1986

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

BLANCHE A. DAVID

v.

DEFENSE LOGISTICS AGENCY

Decision No. SFO7528410811
Date: September 24, 1984

INTRODUCTION

Blanche A. David, (appellant) appeals her removal as a Procurement Clerk (typing) by the Defense Logistics Agency (agency) for absence without leave (AWOL) and failure to request leave properly. For the reasons stated below, the agency action is affirmed.

JURISDICTION

The Merit Systems Protection Board (Board) has jurisdiction over appeals like this one involving the removal of employees who are non-probationary and in

the competitive service. 5 U.S.C. sections 7511-13 and 7701.

FACTS, LAW, ANALYSIS & FINDINGS

Three distinct elements must be shown in any conduct-based adverse action like this one: (1) that the alleged conduct occurred; (2) that there is a nexus between the conduct and the efficiency of the service, that is, there is a need for some disciplinary action; and (3) that the particular penalty imposed is reasonable. Douglas v. Veterans Administration, 5 MSPB 313, 329-330 (1981). These three elements will be discussed individually below along with pertinent facts, law and analysis,

Occurrence of Conduct

The agency removed the appellant effective May 18, 1984, by decision letter dated May 3, 1984 for AWOL between the period December 1, 1983 until March 7, 1984 (the date of the notice of proposed removal). Some background is necessary.

Appellant last reported for work with the agency on May 13, 1983. She was on leave the week of May 16, 1983. The agency next heard about the appellant on June 7 or 8, 1983, when it received a telephone call from an unidentified individual who indicated that appellant was hospitalized and would be unable to return to work. The caller refused to leave a name, telephone number or any other information.

Thereafter the agency made numerous, unsuccessful attempts to contact the appellant and to obtain from her the reason that she was not reporting for work.

For example, on June 19, 1983, appellant's supervisor wrote to her home, enclosed an SF-71 and self-addressed envelope and requested that appellant respond; on August 8, 1983, another supervisor again wrote to appellant, enclosed a SF-71 and self-addressed envelope and requested information relative to appellant's health,

expected return to duty and appellant's wishes with respect to accumulating paychecks. Similar unsuccessful attempts were made by the agency on August 23, 1983, October 27, 1983, November 16, 1983, November 25, 1983, and December 5, 1983.

Indeed the only responses from or about the appellant between June 8, 1983 and the notice of proposed removal in March 1984 were: an SF-71 dated August 8, 1983, bearing appellant's signature and requesting sick leave from May 16, 1983 to an unknown date in the future which did not contain as requested by the agency a doctor's statement or prognosis; a telegram received November 8, 1983, from appellant asking that the agency mail certain compensation forms to her[1]; another telegram dated November 21, 1983 from appellant indicating

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1. This request was complied with by the agency through its November 16, 1983 letter to appellant.

that she intended to file compensation claim forms and requesting that her leave status be changed from sick leave to leave without pay[2]; a telephone call on November 29, 1983 from a woman who refused to identify herself and who said that appellant would be having surgery on November 30, 1983; another telephone call on November 29, 1983 from a nurse in a doctor's office who said she was trying to confirm appellant's hospital appointment.[3]

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2. This was responded to by the agency in its November 25, 1983 letter, in which the agency declined to honor the request for sick leave or leave without pay since it had not received the requested medical certification or any information concerning appellant's status.

3. At the hearing, appellant indicated also that she had submitted a June 2, 1983 SF-171 requesting 112 hours of sick leave, a September 8, 1983 SF-171, and a September 8, 1983 letter from her doctor describing her medical condition and estimating that she could return to work in January 1984. The agency has stated credibly that it did not receive these documents. I would also note that after the time that these documents were purportedly submitted the agency on several occasions informed the appellant that it had not yet been provided with medical certification and included SF-171's which the appellant did not return.

Despite the agency's inability to obtain from appellant the necessary requests for leave along with supporting documentation, it carried the appellant in a sick leave status up until December 1, 1983. At that point she was placed in an AWOL status. Even after that time, however, the agency attempted, again unsuccessfully, to communicate with appellant and obtain the necessary SF-71 and requested documentation.

The agency proposed appellant's removal by letter dated March 7, 1984. Thereafter, a letter signed by appellant was forwarded from the agency's Los Angeles offices and considered by the deciding official as the equivalent of a written response.[4] Again, the agency removed appellant effective May 18, 1984 by decision letter dated May 3, 1984.

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4. This letter indicated that appellant intended to file a claim under the Federal Tort Claims Act, acknowledged receipt of the proposed removal and made various other claims concerning the proposal's unconstitutionality and unlawfulness.

Appellant appealed timely to the Board and requested a hearing. That hearing was held July 19, 1984 and five days thereafter the record was closed.[5]

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5. Late in the afternoon the day before the hearing an attorney representing the appellant phoned the undersigned presiding official and requested a continuance. He stated that he had just had the opportunity to meet with the appellant, that neither he nor she were prepared to proceed with the hearing and that the appellant appeared ill. No specifics concerning appellant's illness were provided. That motion for continuance was renewed the morning of the hearing by the appellant who for the most part stated that a continuance was necessary in order that she have her case presented by an attorney. Appellant's motion was denied on the basis that it was made at the last minute without any showing as to why the appellant was unable to contact the presiding official or the agency previously and without any showing that the appellant was unable because of physical problems to proceed at the time of the hearing. In that regard, I note that there is evidence that the agency attempted unsuccessfully to contact the appellant in order to fulfill obligations imposed by the prehearing order. Similar difficulties were experienced by the undersigned presiding official who attempted to contact the appellant to determine if she intended to appear at the hearing when she did not meet any of those obligations. Likewise, while the appellant seemed slow in moving about, she expressed herself quite capably, had no apparent problems with comprehension or eyesight and appeared unwilling to proceed largely because she did not have an attorney. There is no indication that appellant was diligent in

In relation to the agency's AWOL charge and the charge that appellant failed to request leave in accordance with established procedures, the agency must prove the occurrence of an unauthorized absence, that there was no leave status except AWOL which was appropriate and that the appellant was aware of the agency's leave regulations but refused to follow them. McDonough v. U.S. Postal Service, 4 MSPB 441 (1980), aff'd 666 F.2d 647 (1st Cir. 1981); and Bavier v. Department of Transportation, 5 MSPB 73 (1981). While an agency is required to grant sick leave in some circumstances (not applicable here), an employee must support any sick leave request with acceptable evidence and for absences in excess of three work days, must submit a medical certificate or an administratively acceptable

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attempting to obtain such services. See Daniells v. Department of the Treasury, MSPB Docket No. AT07528110659 (January 20, 1983) and Townsend v. Department of Agriculture, MSPB Docket No. DC07528110549 (December 29, 1982).

employee certification. 5 C.F.R. Sectic 630.401 and 403; Master Agreement, Defense Logistics Agency and DLA Council of Locals, April 1983, Article 25, Section 2; and Zeiss v. Veterans Administration, 7 MSPB 516 (1981).[6] Also, administrative leave is grantable only in the agency's discretion and only in instances where the agency can expect an employee to return to duty and where the granting of such leave offsets such factors as the encumbrance of the position. Federal Personnel Manual, Chapter 630, Subchapter 12.

The probative evidence in the instant appeal shows that the appellant was scheduled for duty during the time charged, that she did not report, that the agency informed appellant that medical certification was needed on numerous occasions and

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6. Of course, the Board will enforce agency leave regulations to include those contained in a collective bargaining agreement. Geisler v. Department of Transportation, 3 MSPB 367 (1981).

that the appellant failed to comply with the agency's request.[7]

The agency has proven by a preponderance of the evidence that the appellant was AWOL between the period December 1, 1983 to March 7, 1984 and that she failed to follow regulations in requesting leave.[8]

The Nexus Between the Conduct and the Efficiency of the Service

The conduct charged must impair the efficiency of the service. E.g., Gallagpher

7. The agency evidence shows that it properly exercised its discretion in not putting the appellant in leave without pay status since it could not afford to encumber the position in that way.

8. While the appellant has not raised this matter, I would be remiss if I did not address the question as to whether the agency had an obligation to file for disability retirement on appellant's behalf. In my view, the agency had no such obligation since it did not know and had no reason to know on the basis of the evidence before it that the appellant was disabled from performing her job or that she was mentally incompetent to file an application on her own behalf. Brink v. Veterans Administration, 4 MSPB 419 (1980); and Rodriguez v. Department of the Army, 10 MSPB 262 (1982). Indeed, even at the present time there is no evidence of such mental inability or incapacity to perform the duties of the position. See new regulations at 49 Red.Reg. 1328 (1984).

v. U.S. Postal Service, 6 MSPB 482 (1981). Clearly, absence from work interrupts the efficiency of the service. E.g., Chiaverini v. United States, 157 Ct.Cl. 371 (1962). Accordingly, I find a direct nexus between the appellant's conduct and the efficiency of the service.

The agency has established by a preponderance of the evidence that "some punishment" was appropriate. I will now discuss whether the particular punishment - removal - promotes the efficiency of the service.

The Reasonableness of the Penalty

As explained in Douglas at 332, the Board's role in evaluating the reasonableness of an agency imposed penalty is to determine after a responsible balancing of the relevant factors, whether the agency decision comes "within tolerable limits of reasonableness." To assist in that determination, the Board in Douglas at 333, pro-

vided a list (not necessarily exhaustive) of the generally recognized mitigation and aggravating factors which should be considered. The factors relevant in the instant appeal include the nature and seriousness of the offense, supervisory confidence in the appellant's ability to perform assigned tasks, the clarity with which the appellant was on notice of the rules violated, her past work and conduct record, and her potential for rehabilitation.

Appellant's offense was serious, particularly in view of the five and a half month length of the AWOL and her absence for the nearly seven months previous. E.g. Huston v. Department of the Air Force, 6 MSPB 223 (1981). And there is little doubt, judging from the averments of appellant's supervisors that they have lost confidence in her ability to appear at work and perform the duties assigned to her.

Also, appellant was clearly on notice

of leave requirements since the agency informed her in numerous correspondence and advised her of the penalty (possible removal) for failure to comply. Likewise, appellant's failure to comply in the face of numerous opportunities reveals that she has little potential for rehabilitation.

I am mindful that appellant is a long term employee who in the past has performed her job well and had no attendance problem. These factors are insufficient to outweigh the seriousness of this lengthy AWOL offense.

Further, I have also considered that the appellant for at least part of the AWOL period was undergoing medical treatment. However, there has been no showing that appellant's health problems prevented her from complying with the somewhat simple procedure of presenting sufficient SF-171s and medical documentation if she was indeed too ill to appear for work.

In view of my analysis of the appropriate factors I find that the agency has proven the facts underlying its penalty by a preponderance of the evidence and has shown that the penalty imposed was within tolerable limits of reasonableness for the offenses sustained.

AFFIRMATIVE DEFENSE

Even though the agency has established the occurrence of the conduct and that removal was reasonable, the agency action must be set aside if the appellant can show that it was "based" on a prohibited personnel practice. 5 U.S.C. Sections 7701 (c)(2)(B); and Stewart v. United States Postal Service, 8 MSPB 427 (1981). In that regard appellant claims that the agency removed her in retaliation for providing affidavit and other support to another employee engaged in litigation against the agency and for disclosing information during that proceeding which appellant

reasonably believed evidenced a substantial danger to public health or safety.[9]

To prove such a claim, appellant has the burden to show that (1) she was engaged in a protected activity; (2) she was treated adversely by the agency; and (3) there is a causal link between the protected activity and the adverse action. Valerino v. Department of Health and Human Services, 7 MSPB 347 (1981). Even assuming appellant was engaged in a protected activity[10] and that the agency adversely treated her (removal) she has not shown a causal link between the protected activity and the adverse action. Indeed, despite appellant's long absence the agency did not even put the appellant in an AWOL status until December 1, 1983 and did not take action against her until March 7, 1984. Before

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9. In this other proceeding, appellant provided evidence concerning alleged environmental health hazards which existed at the agency facility.

10. See e.g., 5 U.S.C. 2302 (b)(8) and (9).

that time she was given numerous opportunities to conform her obviously improper conduct to agency regulations. She did not do that and the agency removed her for AWOL and failure to comply and not because of any participation in a law suit or because of any disclosure of information.

The appellant has failed to prove by a preponderance of the evidence that the agency retaliated against her.[11]

CONCLUSION AND DECISION

The agency has established by a pre-

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11. It is unclear whether the appellant is making a claim of handicap discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. Section 791. In any event, appellant has not shown that she is handicapped, that the agency knew or should have known of any handicap or that the disciplinary action taken against her was because of her handicap. Stalkfleet v. U.S. Postal Service, supra; Henderson v. U.S. Coast Guard, MSPB AT07528010362 (January 21, 1983); and Webb v. U.S. Postal Service, 9 MSPB 749 (1982). Similarly, appellant's generalized claims in her petition for appeal concerning the unconstitutionality of the agency action and other asserted violations are unsupported by evidence.

ponderance of the evidence that the appellant committed the conduct charged and that removal is a reasonable penalty for such conduct. Further, the appellant has failed to show by a preponderance of the evidence that the agency committed a prohibited personnel practice.

The agency's removal decision is AFFIRMED.

APPEAL RIGHTS

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing an original and two copies of a petition for review with the Secretary, Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, in accordance with 5 C.F.R. Section 1201.114 and .115. The petition for review must be filed on or before October 29, 1984, and must set forth objections to the initial

decision, supported by references to applicable laws, regulations, and the record.

This initial decision will become a final decision of the Board on October 29, 1984, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. Sections 1201.113 and .117.

If the appellant wishes to contest the Board's final decision on the issue(s) of discrimination (s)he has raised, (s)he may obtain administrative review of the (those) issue(s) alone by filing a petition for review with the Equal Employment Opportunity Commission (EEOC) within 30 days of the date the initial decision becomes final. 5 U.S.C. Sections 7701(b)(1) and 7702(b)(3)(B).

If the appellant wishes to contest the Board's final decision on the issue(s) of discrimination and has not filed a petition with EEOC, (s)he may obtain judicial review of all issues by filing a petition with an

appropriate United States District Court within 30 days of the date the initial decision becomes final. 5 U.S.C. Sections 7702(a)(3) and discrimination which were brought before the Board under 5 U.S.C. Section 7702, appellants have the right to request the court to appoint an attorney to represent them. 42 U.S.C. Section 2000e-5(f)(2).

If the appellant chooses not to contest the Board's final decision on the discrimination issue(s), (s)he may obtain judicial review of the other issues by filing a petition with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition must be received by the Court within 30 days of the date the initial decision becomes final. 5 U.S.C. Section 7703(b)(1).

FOR THE BOARD:

SAMUEL A. VITARO
PRESIDING OFFICIAL

FROM MERIT SYSTEMS PROTECTION BOARD
UNITED STATES GOVERNMENT

MEMORANDUM

Dated: 2 June 1978

TO: DCRL-GFP

FROM: DCRL-GFP (LTC MC GOWAN/69537/pjr)

SUBJECT: Potential Problem with Air Circulation System

Attached is a medical statement from Letterman Army Medical Center that our building air conditioning bstem may contain allergen thermophilic actinomyces. It is requested that this matter be referred to the GSA for appropriate investigation/ action.

E.B. MC GOWAN
LTC, ORDC, USA
Chief, Production
Division

Encl.

FROM MERIT SYSTEMS PROTECTION BOARD

DEPARTMENT OF THE NAVY
Letterman Army Medical Center
Presidio of San Francisco, CA 94129

26 May 1978

RE: SCOTT, DORIS

MEDICAL STATEMENT

I began seeing Ms. Scott on 16 May 1978 for multiple medical complaints. At that time she stated that since beginning work in a new building at the same job and with the same co-workers in July 1977, she has had frequent episodes in which she develops over the period of 1-2 days a feeling of nasal congestion, dry cough, chest congestion, and general malaise. The symptoms persist through the time she works in the building during the week and then disappear following her being home from work on the weekend or over holidays. Within 1-2 days of returning to work she develops the same symptom complex. She states that several co-workers have told

her that they have had the same symptoms since moving into the present building although not to the same degree as she has had them.

Ms. Scott's symptoms are strongly suggestive of contact with an air-borne allergen, thermophilic actinomyces, which lives in some air conditioning and heating systems. I have arranged for Ms. Scott to see a pulmonary specialist in regard to the symptoms, and this appointment has been made for 28 June 1978. In the interim I feel that it is medically indicated that Ms. Scott be transferred to a place of employment outside the current building in which she is working or be granted a leave of absence for medical reasons until her symptoms are further investigated. Ms. Scott is not, specifically, medically disabled at this time and should be able to continue to work at the same or similar duties at which she is employed, but

should simply do so in a building geographically removed from the one in which she is experiencing her symptoms.

STEPHEN F. WALLER, M.D.
Major, MC
Neurology Clinic

FROM MERIT SYSTEMS PROTECTION BOARD

Dated: 25 February 1983

DCRL-GFB

SUBJECT: Improvement of Air Quality at DCASMA, San Francisco

Mr. John C. Hackman
P.B.S. Operations Branch
General Services Administration
555 Battery Street, Room 503
San Francisco, CA 94111

Dear Mr. Hackman:

Reference: Building survey conducted by GSA Representative, Mr. Hackman, on Friday, 18 February 1983.

To further supplement our discussion on Friday concerning air conditioning problems at DCASMA, San Francisco Headquarters Building, 1250 Bayhill Drive, a copy of a complaint and petition which I was made aware of after your visit is enclosed. I believe this is a good example of the type of employee complaints we are receiving and it also identifies the physical ailments employees are experiencing.

It is suggested that GSA request the lessor to inspect the air conditioning system in the building for the purpose of providing better circulation.

Sincerely,

R.I. IVERSON
Captain, SC, USN
Commander

_____Concur
DCRL-GFA ELAINE F.
COURTIER

PETITION TO IMPROVE AIR QUALITY AT DCASMA-SF

We, the undersigned, request that the air ventilation system in the building at 1250 Bayhill Drive, be inspected and adjusted to provide better circulation. It is our contention that the incidence of headaches and related sinus problems are caused by the lack of adequate air circulation and its quality. Work productivity and morale are directly affected by the poor quality of this office's atmosphere.

Thomas J Turnet	DCRL-GFCB/85
Pat Sancinito	DCRL-GFCA/85
Jean Lowe	DCRL-GFCA/84
Fran Zielke	DCRL-GFCA/84
[illegible]	DCRL-GFCA/89
Irma Elia	DCRL-GFCA/84
Robert Huth	DCRL-GFCA/89
[illegible]	DCRL-GFCA-87
Glenn Benson	DCRL-GFCA/84
Marge Osborne	DCRL-GFCA/87
[illegible]	DCRL-GFCA/85
R. Tomsett	DCRL-GFCA/87
Leigh Barker	DCRL-GFCB/88
Yvonne D Evans	DCRL-GFCB/83
Grace Putman	DCRL-GFCB/88
Georgia Moore	DCRL-GFCB/85
Carl Thornhill	DCRL-GFCB/85
[illegible]	DCRL-GFCB
Cleo Mavredes	DCRL-GFCB

29a

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COPY

Form Approved
OMB No. 53-R0066

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
CHARGE AGAINST AGENCY

INSTRUCTIONS: File an original and 4 copies of this Charge, together with one copy for each additional party named, with the appropriate Regional Director, Federal Labor Relations Authority. After filing the Charge, serve a copy of the Charge on each party against which the Charge is made. If more space is required for any item, attach additional sheets, numbered according to the item to which it pertains.

DO NOT WRITE IN THIS SPACE

CASE NO.
9-CA-30109

DATE FILED
Dec 29, 1982

(a) (Including names and addresses) of those upon whom service has been made should accompany the Charge.

ACTIVITY AND/OR AGENCY AGAINST WHICH CHARGE IS MADE

A. NAME OF ACTIVITY AND/OR AGENCY
DoD, DLA, DCASR-Los Angeles, DCASMA-SF, ET AL. AT SAN BRUNO, CALIFORNIA 94066

B. ADDRESS (Street and Number, City, State and Zip Code)
11099 South La Cienega Blvd., Los Angeles, California 90045

C. PERSON TO CONTACT, TITLE
Ms. Mary Ryabik, Labor Relations Specialist

D. PHONE NO.

E. NO. OF EMPLOYEES EMPLOYED
approximately 3500

F. IF CHARGE IS MADE AGAINST AN ACTIVITY, NAME THE AGENCY OF WHICH THE ACTIVITY IS A PART DCASR-Los Angeles, Et Al.
Defense Logistics Agency

THE ABOVE-NAMED ACTIVITY AND/OR AGENCY HAS ENGAGED IN VIOLATIONS OF 5 U.S.C. 7116(a), SUBSECTION(S) (1) AND (5) and (8).
(List Subsection(s))

BASIS OF THE CHARGE (Give a clear and concise statement of the facts constituting the alleged unfair labor practice and the date and place of occurrence of the particular acts.)
This unfair labor practice case involves Ms. Irene D. Parodi, a person and employee whose employment in DoD, DLA, DCASR-LA, DCASMA-SF, ET AL. at San Bruno, Ca. 94066, has ceased because of 7116(a)(1)(5) and (8), 5 U.S.C. unfair labor practices committed by aforesaid parties against Ms. Parodi and her Exclusive Representative (AFGE Local 2723) without their knowledge commencing approximately on June 1, 1979 and thereafter and continuing to October 21, 1982, the date the undersigned discovered a news report in the local newspaper concerning Ms. Parodi, her plights and that she suffers from an occupational illness, and who has not obtained any other regular and substantially equivalent employment, as determined under regulations prescribed by the Federal Labor Relations Authority, and has and continues to be deprived of her rights to collect unemployment insurance benefits, disability insurance benefits under social security law and workers' compensation benefits for suffering a disease proximately caused by the employment by reasons of aforesaid parties gross failures to counsel Ms. Parodi over the occupational illness, etc. , their failures to prepare and forward appropriate paperwork, etc. to Ms. Parodi, as well as to prepare and forward Form CA-2 in her behalf to the Office of Workers' Compensation

INFORMATION CONCERNING ALTERNATIVE PROCEDURES USED FOR RESOLUTION OF MATTERS COVERED BY THIS CHARGE:
HAS THE SAME FACTUAL SITUATION OR ISSUE COVERED BY THIS CHARGE BEEN RAISED --

A. UNDER A GRIEVANCE PROCEDURE? ☐ YES ☒ NO

B. WITH THE FEDERAL SERVICE IMPASSES PANEL, THE FEDERAL MEDIATION AND CONCILIATION SERVICE, THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE MERIT SYSTEMS PROTECTION BOARD OR THE SPECIAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD FOR CONSIDERATION OR ACTION? ☐ YES ☒ NO

C. WITH THE FEDERAL LABOR RELATIONS AUTHORITY UNDER THE NEGOTIABILITY PROCEDURE? ☐ YES ☒ NO

IF "YES," INDICATE UNDER WHICH PROCEDURE YOU SELECT TO PROCEED (Check one)
☐ UNFAIR LABOR PRACTICE PROCEDURE ☐ NEGOTIABILITY PROCEDURE

DECLARATION

A. FULL NAME OF PARTY FILING CHARGE (If labor organization, give local name and number, national or international, and affiliation, if any)
Blanche A. David, AFGE Steward, LOCAL 2723, Affiliated With The AFL-CIO

B. ADDRESS (Street and Number, City, State and Zip Code)
P. O. BOX 426, San Bruno, California 94066

C. PHONE NO.
415/876-9505

I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001).

BY (Type or print below the name of the representative or person filing the Charge)
Blanche A. David, AFGE Steward, LOCAL 2723

SIGNATURE
Blanche A. David

BLANCHE A. DAVID, AFGE STEWARD, LOCAL 2723

ADDRESS (Street and Number, City, State and ZIP Code)
P.. O. BOX 426, SAN BRUNO, CALIFORNIA 94066

TITLE	PHONE NO.	DATE
AFGE STEWARD, LOCAL 2723	415/876-9505	December 27, 1982

FLRA Form 13
(Rev. 2-80)

31a

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FROM MERIT SYSTEMS PROTECTION BOARD

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
San Francisco District Office
10 United Nations Plaza
San Francisco, CA 94102

14 June 1983

Director, Equal Employment Opportunity
Defense Logistics Agency
ATTN: KLA-KE
Cameron Station
Alexandria, VA 22314

Re: Helen B. Bellew and Elisa Fernandez vs. Defense Contract Administration Services Management Area, San Francisco
EEOC Cases No. 091-83-X0097 and 091-83-X0098

Dear Sir or Madam:

Transmitted herewith are two copies of the Recommended Decision on the discrimination complaints of Helen B. Bellew and Elisa Fernandez, employees of the Defense Contract Administration Services Management Area, San Francisco. The two cases were consolidated for purposes of the hearing and the Recommended Decision.

Also enclosed please find the case

file and correspondence file for each case, and a folder containing the exhibits admitted in evidence at the hearing and post-hearing.

The original copy of the transcript is enclosed. One copy has been forwarded to the EE Manager, Defense Contract Administration Services Region, Los Angeles. That office has agreed to make two additional copies and forward them to you. Unfortunately, the Court Reporter furnished only an original and one copy of the transcript. (But see page 80 of the transcript).

At the time of your decision on this matter, a copy of this Recommended Decision, and a copy of the transcript, must be forwarded to each complainant, separately. Additionally, a copy of your decision and this Recommended Decision should be forwarded to Ms. Bellew's representative. 29 CFR 1613.221.

I would appreciate receiving a copy

of your final decision(s) on these cases.

Very truly yours,

Ann Wansley, Attorney
Examiner

Enclosures

cc (w/o enclosures):

Helen B. Bellew
Elisa Fernandez
Blanche A. David
Jenifer B. Smith
Marie R. Seckler

FROM MERIT SYSTEMS PROTECTION BOARD

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-7671

IRENE D. PARODI, Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent,

and

OFFICE OF PERSONNEL MANAGEMENT,
Intervenor-Respondent.

AFFIDAVIT OF BLANCHE DAVID

I, BLANCHE DAVID, under penalty of perjury declare and say:

1. I am over the age of 18 years, I am a resident of California, and I am not a party to the above-entitled action.

2. I am employed at the Defense Logistic Agency, San Bruno, California. My job at the DLA is that of senior research clerk. I am familiar with the facility, including the main contract room and the computer room.

3. I have reviewed the job description of the position offered MRS. PARODI, which is marked Exhibit "A", attached hereto and incorporated herein by this reference. The position is that of "senior research clerk", which is the same as my job. I am therefore highly qualified to evaluate the responsibilities of that job.

4. Although MRS. PARODI has been assigned to the computer room, the job will require MRS. PARODI to spend most of her time away from her desk and in the large contract documents room where she was assigned before. The job requires that she meet with ACOs throughout the building. Her work space is therefore approximately 29,000 square feet, none of which is smoking-restricted. She must review files and contracts, all of which are located in the larger contract documents room.

5. It is impossible to perform the job of research clerk usefully or effi-

ciently by staying in the computer room. It is my opinion that MRS. PARODI would necessarily spend at least 3-to-4 hours per day in the main working area where the smoky air makes her sick.

6. The large contract documents room has very bad air quality. Many of the employees and supervisors smoke. The issue of smoking is very sensitive, and any employee who asks a supervisor to quit smoking risks receiving a poor job report.

7. We have been in contact with the health and safety officers regarding the ventilation and air conditioning in the building, but nothing has been done to improve the same since MRS. PARODI left work in 1979.

8. The position of research clerk is a "dead-end" job. I have been in the position since 1977, when I was demoted pursuant to a Reduction In Force notice, and I have been a GS-5 ever since. In fact, I had been

promised to be promoted to a GS-7 as far back as 1968. The research clerk position offers no opportunity at advancement, and I expect that I will never receive a promotion and will retire a GS-5.

By contrast, a procurement clerk position offers the possibility of advancement, in many cases all the way to GS-12.

I certify and declare under penalty of perjury that the foregoing is true and correct, except as to those matters stated on information and belief, and as to those matters I believe it to be true. I certify and declare under penalty of perjury that this Affidavit is executed on the 12th day of January, 1983.

BLANCHE DAVID

State of California)
County of San Mateo) ss

Subscribed to and sworn before me this 12th day of January, 1983.

Notary Public for the
State of California

FROM MERIT SYSTEMS PROTECTION BOARD

DAVID L. MACKLER, M.D.
A Professional Corporation
Internal Medicine
4141 Geary Boulevard
San Francisco, CA 94118

September 9, 1983

TO WHOM IT MAY CONCERN:

RE: BLANCHE DAVID

The above mentioned patient has been under my care since June 3, 1983 when she was hospitalized for extensive, severe pneumonia.

She was almost blind in both eyes by cataracts. The one in the right eye was removed in July 1983.

In addition, the patient is being treated for severe osteoporosis which has caused lordosis of her thoracic spine.

Her lung condition is slowly improving, and she is to have the cataract in her left eye removed in October 1983. Following cataract surgery, it is estimated that

Mrs. David will not be able to return to work until January 1984.

Very truly yours,

DAVID L. MACKLER, M.D.

DLM/jhp

RESPONSIBLE PARTY INFORMATION

Account ID: 11021
DAWYDIAK,BLANCHE D
2826 TIBURON WAY
BURLINGAME, CA. 94010

Acct Type....Priv....Private pa
Telephone....xxx-xxx-1192
Ref #.....0
Referral.....

PRIMARY INSURANCE

Type.....4 commercial
Carrier...Commercial Insurance
Insured...DAWYDIAK,BLANCHE
Policy....MUTUAL OF OMAHA
Sig Date..062683
Assgn.....Y

SECONDARY INSURANCE

Type.....
Carrier...
Insured...
Policy....
Sig Date..
Assgn.....

PATIENT 1 INFO

DAWYDIAK,BLANCHE D
Sex.....F
DOB.....101719
Assgn Dr..JWK
Ref #.....0

Relation 1..SELF
Relation 2..
Medicaid ID.

MEDICAL DATES

Onset of Ill.....
1st Consulted.....062083
Hospital Adm.....113083
Hospital Dis.....120283
Start Part Dis....
End Part Dis.....
Start Ttl Dis.....113083
End Ttl Dis.....033084
Return to Work....040184

MEDICAL INFO

Employment Related..n
Auto Accident.....n
Other Accident.....n
Similar Symptoms....n
Outside Lab Work....n
EPSDT.....n
Family Planning.....n
Emergency.....

FINANCIAL STATUS

Budget Pymt..... 0.00
Last Visit.....120183
Last Billing.....010384
Last Payment.....120983
YTD Payments..... 0.00

Account Balance....	0.00
Current.....	0.00
31 - 60 Days.....	0.00
61 - 90 Days.....	0.00
91 - 120 Days.....	0.00
> 120 Days.....	0.00

TRANSACTION HISTORY

SERV DATE	POST DATE	PATIENT NAME	DR	FS	TRNS CODE	DESCRIPTION	DX/REF	AMOUNT	S
						Beginning Balance.....		*0.00	
062083	062083	BLANCHE D	01	08	92002	NP INIT EX	366.	55.00	
062083	062083	BLANCHE D	01	08	76516	ULT/BID	366.	135.00	
062483	062483		01		00900	Cash	6/24/83	150.00-	
062783	062783	BLANCHE D	01	09	66980	ECCE IOL	366.	2400.00	
070183	070183		01		00901	Check	GR7L0T054	2400.00-	
070183	070183		01		00944	Refd Ins	04/50	200.00	
102683	102683	BLANCHE D	01	08	76516	ULT/BID	366. V43.1	135.00	
112183	112183	BLANCHE D	01	08	90050	DP LTD OV	366. V43.1 372.72	30.00	
120183	120183	BLANCHE D	01	09	66980-70	ECCE IOL	366. V43.1	2400.00	
120583	120583		01		00901	Check	04300120023	2400.00-	
120983	120983		01		00908	Ins Pymt	BIOMTRY	1[illegible].75-	
120983	120983		01		00967	Ins NoAlow	BIOMTRY	43.75-	
						Ending Balance.....		*0.00	

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FROM THE MERIT SYSTEMS PROTECTION BOARD

JOHN MURCKO
Attorney at Law
436 Fourteenth Street (Suite 728)
Oakland, CA 94612

August 22, 1984

Samuel A. Vitaro
Presiding Official
Merit System Protection Board
525 Market Street, Suite 2800
San Francisco, CA 94106

Re: Blanche A. David v. DLA
No. SF07528410811

Dear ALJ Vitaro,

Please be advised that I am writing this letter on behalf of Ms. David. On August 22, 1984 I called the MSPB regarding the case of David v. DLA. I notified you that Ms. David was in my office and wished to retain me to represent her at the hearing scheduled for tomorrow. I notified you that she has made attempts for the last three months to obtain an attorney to represent her before the MSPB without success.

Everyone said that they do not know the procedures and could not represent her. As I explained to you, Ms. David obtained my name from Ms. Parodi one week ago. She called my offices on Monday, August 20, 1984. I returned her call today and spoke to her about it. I told her that I would represent her provided that I could obtain a continuance of the hearing from August 25, 1984 to mid-October, 1984. I am occupied until September 6, 1984 and then I will be going on vacation until September 25, 1984.

During our telephone conversation I notified you that I could not be prepared in one day to handle the case. I also told you that Ms. David was a sick woman because she has osteoporosis, asthma and a lung disorder. She appears very weak and has extreme difficulty functioning. I do not believe that she is physically or mentally capable of representing herself. You

stated that you would not grant her a continuance because the case must be done.

I spoke to counsel for DLA, Ms. Jennifer Smith who also refused to stipulate to a continuance. It is my understanding that all of the witnesses that have been subpoened are from San Mateo County. There are three witnesses.

I am asking you again please grant Ms. David a reasonable continuance so that she can have representation at the hearing. The other side has an attorney and she should have the right to have one also.

Sincerely,

John Murcko

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Mid)	2. SSN	3. Person Identifier (DoI)	4. Date of Birth
NVIO, RANCHE A	0[illegible] 12 [illegible]76		10 17 [illegible]

5. Service Preference	6. Serv. Comp. Date (Leave)	7. Tenure	8. Retirement
1—None 3—10 Pt. Disab. 5—10 Pt. Other 2—5 Pt. 4—10 Pt. Comp. 6—10 Pt./30% Comp.	04 17 [illegible]7	1	1 1-CS 3-FS 8-Other 2-FICA 4-None 6-CS Spec

9. Position Title	10. FLSA	11. Sex	12. Cov.	13. Comp. Level (Occ)
BASIC LIFE PLUS STANDARD OPTION	N E-Exempt N-Nonexempt	F	1 1-US 8-Other	0[illegible]5

14. Effective Date	15. Annuitant Indicator	16. Work Schedule	17. (Reserved for OPM Use)
12 84	9 1-Reempl Area-CS 3-RETM 5-RETM & CS 2-RETO 4-RETO & CS 9-Not Applicable	F F—Full-time P—Part-time I—Intermittent Q—FT Seasonal R—PT Seasonal J—INT Seasonal	

18-B. Nature of Action	18-A. NOAC	18-B. Nature of Action
REMOVAL		

18-D. Authority	18-C. Auth Code	18-D. Authority
5 USC 75 POSTAPPT EQ		
18-F. Authority	18-E. Auth Code	18-F. Authority

26. Position Title and Number	27. To: Position Title and Number
OCUREMENT CLERK (TYPING) 11352N00	

25. Agency and Location of Employing Office	28. Name and Location of Employing Office
ASR LOS ANGELES S ANGELES CA ASHA SAN FRANCISCO FA) COMMAND SUPP OFC CA	

19. Appropriation Code	22. Basis of Level	24. Step or Rate	25. Salary	26. Pay Basis	29. Pay Plan & Occupational Code	30. Grade or Level	31. Step or Rate	32. Salary	33. Pay Basis
401106	05	10	17566.00	PA					

34. Duty Station	35. Position Occupied	36. Appropriation Code (Optional)
SAN BRUNO CALIFORNIA	1 1-Competitive 3-SES General 2-Excepted 4-SES Career Reserved	57013200

ESS:1826 TIBURON HY, BURLINGAME,CA 94010
P-SUM PAYMENT TO BE MADE FOR ANY UNUSED ANNUAL LEAVE.
ON(S) FOR REMOVAL: ACTION TAKEN IN ACCORDANCE WITH LETTER DCRL-GFB DATED 3 MAY 1984,
ECT: NOTICE OF DECISION - REMOVAL. EMPLOYEE REMOVED FOR BEING ABSENT WITHOUT LEAVE (AWOL)
E 1 DECEMBER 1983 AND FOR FAILURE TO REQUEST LEAVE IN ACCORDANCE WITH ESTABLISHED
EDURES.
ISSUED.

32. Approving Official	33. Date	38. FPMIS Data				
LIAM PERSONNEL OFFICER	05 29 84	A. Sign or Reason Int. G	B. VEV IND	C. PRO C	D. Barg. Unit Status [illegible]	E. Functional Class [illegible]
34/Authentication of Approving Official		F. Ed. Level 02 12	G. Year Degree Attained	H. Academic Discipline	I. Agency Code [illegible]37	
[illegible]ANCO J. ER, JR., DIRECTOR, PERSONNEL BASE LOGISTICS AGENCY		J. Location Code 0A322(0[illegible]1			K. SON [illegible]184	
		[redacted]	N.	O.	P	Q.

3 - Personnel Folder Copy

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